Supreme Court, U.S.
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No. 99-1248

IN THE

Supreme Court of the United States

COOK GROUP INCORPORATED, WILSON-COOK MEDICAL, INC., COOK INCORPORATED, VANCE PRODUCTS INCORPORATED and SABIN CORPORATION,

Petitioners,

v.

JON S. WILSON and WILTEK MEDICAL INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court should grant review in this case to determine whether the Bankruptcy Court abused its discretion in denying Cook's Motion to hold Wilson and Wiltek in contempt of the May 22, 1995, Injunction insofar as it pertained to Trade Secret Nos. 3 and 14, when the Bankruptcy Court's decision has been affirmed by the District Court and the Fourth Circuit.

STATEMENT PURSUANT TO RULE 29.6

The assets of Wiltek Medical, Inc. were purchased by Ballard Medical Products, a publicly traded company (NYSE:BMP) in May of 1999. Ballard Medical Products has been acquired by Kimberly Clark Corporation, a publicly traded company (NYSE:KMB).

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STATEMENT OF THE CASE

This matter is before the Court upon the petition of Cook Group, Inc., Wilson-Cook Medical, Inc., Cook, Inc., Vance Products, Inc. and Sabin Corp. (collectively the "Cook Companies" or "Cook") for a writ of certiorari from the Opinion of the United States Court of Appeals for the Fourth Circuit entered on October 27, 1999, which affirmed two lower courts — the United States Court of Bankruptcy Court for the Middle District of North Carolina, and the United States District Court for the Middle District of North Carolina — in finding that Respondents Jon S. Wilson ("Wilson") and Wiltek Medical, Inc. ("Wiltek") did not violated the Injunction entered by the Bankruptcy Court on May 22, 1995 (the "Injunction") insofar as the Injunction pertained to Trade Secret Nos. 3 and 14.

FACTUAL BACKGROUND

The Petition misstates the facts as found by the Bankruptcy Court and affirmed by the District Court and the Fourth Circuit. In doing so, it attempts to paint an exceptionally misleading picture in what appears to be a last-gasp attempt by the Cook Companies to keep some portion of this exhaustive litigation alive. A few of the more egregious misrepresentations are highlighted below. The following factual summary is drawn from the record below, with citations where appropriate.

This litigation began in the Spring of 1990, and continues today, nearly ten years later.[1] On May 22, 1995, following a

1. *See, e.g.*, 927 F.2d 598, 1991 WL 27150 (4th Cir. 1991) (affirming District Court's denial of preliminary injunction); 149 F.3d 249, 251 (4th Cir. 1998).

two and one-half month trial in the Fall of 1994, the U.S. Bankruptcy Court for the Middle District of North Carolina, Chief Judge William L. Stocks, entered a 197 page Memorandum Opinion, Findings of Fact and Conclusions of Law (the "Opinion"), together with an Injunction and Judgment. (4th Cir. J.A. 58-255) Although the Cook Companies claimed thirty alleged trade secrets at trial (twenty-seven allegedly misappropriated, three "threatened" to be misappropriated), the Bankruptcy Court found that only eleven of those items were in fact trade secrets, and by the time of trial Wiltek was using only six of those. The Injunction prohibited Wilson and Wiltek from using those items for so long as they continued to be trade secrets.

The Bankruptcy Court found in favor of Wilson and Wiltek, and against Cook, on nineteen claimed trade secrets and on virtually all of the Cook's numerous other claims, including state law unfair competition, federal law unfair competition, state law unfair trade practices, state law trademark infringement, federal law trademark infringement, and federal copyright infringement.

In particular, the Bankruptcy Court, as well as the District Court and the Fourth Circuit, completely rejected Cook's claim, implicitly repeated in its Petition, that Wiltek was a "clone" of Cook. (Opinion at pp. 166, J.A. 223) ("However, the evidence established that Jon Wilson's knowledge, skill and ability, together with the utilization of information and processes which were *not* confidential nor trade secrets, were *much more* responsible for the establishment and success of Wiltek than were the utilization of the processes found to be trade secrets.") Put simply, Wilson did *not*, as Cook misrepresents in its Petition, "cop[y] Wilson-Cook's key product line and its confidential manufacturing processes." Pet. at 5.

Similarly, the Bankruptcy Court *rejected* Cook's claims that its alleged trade secrets were "developed at great expense of time and money" as Cook misstates at page 4 of its Petition. (Opinion pp. 167-169, J.A. 224-25) Nor did the Bankruptcy Court find that Cook's alleged secrets were "scrupulously guarded by them from disclosure to outsiders," as Cook further misrepresents in its Petition at page 4. For example, with respect to alleged Trade Secret No. 1,[2] one of the nineteen alleged trade secrets on which the Court found for Wilson and Wiltek, and against Cook, the Bankruptcy Court stated that "The evidence also shows that plaintiff did *not* treat the use of [alleged Trade Secret No. 1] as a trade secret and failed to take reasonable steps to preserve the secrecy of [alleged Trade Secret No. 1]." (Opinion pp. 95-96, J.A. 152-53.)

Another example of Cook's failures to "scrupulously guard" its alleged secrets from disclosure to outsiders was alleged Trade Secret No. 19 and No. 20, which the Bankruptcy Court found *Cook itself* disclosed to the medical device industry and the public through catalogs and product data sheets. (Opinion, p. 139, J.A. 196.) In any event, it is undisputed that Wilson and Wiltek no longer use any of the items found to be trade secrets.

The Cook Companies filed three post-trial motions, one of which was a Motion to Amend the Injunction to permit Cook to conduct an unlimited number of unannounced inspections of Wiltek. These Motions were denied by the Bankruptcy Court by Orders entered November 7, 1995, with the exception that the Motion to Amend Injunction was

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2. The trade secret numbers are from Cook's list of 30 alleged trade secrets.

granted to the limited extent of allowing one inspection between November 1, 1995, and October 31, 1997 (the "Inspection Order").

The Cook Companies appealed the Bankruptcy Court's Findings and Conclusions, together with its rulings on their post-trial Motions, to the U.S. District Court for the Middle District of North Carolina, which affirmed the Bankruptcy Court Orders in their entirety by Order entered June 30, 1997. The Cook Companies then appealed the District Court's affirmance of those Orders to the Fourth Circuit, and by Order filed September 23, 1998, the Fourth Circuit affirmed the Orders of the District Court and the Bankruptcy Court in their entirety. 165 F.3d 913, 1998 WL 671658 (4th Cir. 1998). The Cook Companies then filed a Petition for Rehearing and a Suggestion for a Rehearing *en banc*, together with a Motion to Withdraw and Correct the Opinion filed by the Fourth Circuit. The Petition for a Rehearing and Suggestion for a Rehearing *en banc*, together with the Motion to Withdraw and Correct the Opinion, were denied by the Fourth Circuit by Order filed October 23, 1998

Meanwhile, on October 1, 1997 — shortly after learning of another company's interest in purchasing Wiltek — the Cook Companies inspected Wiltek pursuant to the Inspection Order. Before even entering Wiltek's manufacturing area or observing anything that Wiltek was doing, counsel of record for Cook informed a Wiltek employee that Cook was going to "shut Wiltek down." (J.A. 274-76) Not surprisingly, given that stated intention, Cook subsequently asserted that it "discovered" five alleged trade secrets being practiced at Wiltek, in alleged violation of the Bankruptcy Court's Injunction.

So that Wilson and Wiltek could know exactly what was being alleged by Cook in order to prepare a defense, the Inspection Order required the Cook Companies to provide a detailed report concerning their inspection within fifteen days, *i.e.*, on or before October 16, 1997. The Cook Companies failed to submit the required detailed report, and instead, on October 20, 1997, filed a "Motion for Entry of Rule or Order to Show Cause and for Other Relief for Defendants' [alleged] Violations of Permanent Injunction" (the "Motion for Entry of Rule"). (J.A. 278)

Trade Secret Nos. 3, 5, 6, 8 and 14 were at issue in Cook's Motion for Entry of Rule. Following a hearing on the Motion for Entry of Rule, Judge Stocks entered a Second Memorandum Opinion and Order on December 8, 1997 (J.A. 750-792) finding that Wilson and Wiltek were *not* in violation of the May 22, 1995, Injunction insofar as it pertained to Nos. 3 and 14 (J.A. 756-62 and 779-88), a finding which was affirmed by the U.S. District Court for the Middle District of North Carolina, (J.A. 2388-96), and by the Fourth Circuit, 199 F.3d 1329, 1999 WL 976491 (4th Cir. 1999) (the "Fourth Circuit Opinion"). It is the Fourth Circuit Opinion which is now before this Court on the Petition.

Judge Stocks' December 8, 1997, Second Memorandum Opinion has been included in its entirety by the Cook Companies in an appendix which they have filed under seal, SA 46-84. This Court should note that the only portions of the Second Memorandum Opinion which are at issue here are those pertaining to Trade Secret Nos. 3 and 14. The Second Memorandum Opinion also discusses Trade Secret Nos. 5, 6, and 8, and finds the Respondents in contempt for using those trade secrets. Unfortunately, the Cook Companies

have chosen to omit from their supplemental appendix a *later* Amendment to Second Memorandum Opinion filed by Judge Stocks on May 7, 1999 (which Respondents have submitted with this Response so as to set the Record straight), in which the Bankruptcy Court *reversed* its earlier contempt findings as to Trade Secret Nos. 5, 6 and 8, and found that Wilson and Wiltek were *not* in contempt of the Injunction with respect to those trade secrets.[3]

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3. Cook also has filed a videotape with the Court, under seal. This videotape was created by the Cook Companies *after* the contempt hearing before Judge Stocks, and was *not* part of the record of the proceedings before Judge Stocks, the trial judge in this case. The videotape is improper, untimely, misleading, and should not be permitted by this Court. The videotape was not before the trial court and is not properly part of the record before this Court. Rather, it is a new exhibit created by the Cook Companies through high-tech videotape splicing, *after* the contempt hearing. Put simply, it was not even offered before the trial court, much less admitted, and therefore is not properly part of the record before this Court.

This videotape was first submitted to the District Court immediately prior to the hearing on the appeal of this particular matter before the District Court, and after the deadline for submissions to the District Court. There was no motion filed by the Cook Companies in the District Court to present the videotape to the District Court. Moreover, the Fourth Circuit, by Order filed September 21, 1999, *denied* Cook's motion to display this videotape at oral argument.

Finally, the videotape is misleading, inasmuch as it omits to show or tell the viewer exactly what the trade secrets at issue are. This new videotape shows the entire processes, which are not at issue. Rather, the only issues here involve the *particular* liquid in No. 14 and the welding of a *ball* in No. 3. Indeed, the new video even goes so far as to show two still shots of a Cook product that

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REASONS FOR DENYING THE WRIT

The only reason set forth by the Cook Companies for granting the writ is that, according to Cook, the Fourth Circuit Opinion conflicts with decisions of the Third, Seventh, Tenth, Eleventh and Federal Circuits. Remarkably, however, only a single page of Cook's twenty page Petition (bottom of page 16, top of page 17) discusses this alleged "split" among the circuits. Cook's discussion of this alleged split is scanty because in fact there is no such split. Moreover, the Fourth Circuit Opinion does not conflict in any way, shape or form with the decisions of other circuits.

I. There is no compelling reason for review of this fact-bound matter where Petitioners attempt to transform a purely factual and discretionary matter into a legal question.

First, this case comes to the Court on an appeal from a denial of a contempt motion. The standard of review on an appeal from the denial of a motion for a contempt order is

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had been end radiused, *not* ball welded. End radiusing was *not* the claimed trade secret in this matter, and was *not* the trade secret found by the trial court. Despite this fact, it is what the Cook Companies have chosen to display on this new videotape, in what would appear to be an after the fact attempt to change the trade secret.

Judge Stocks' findings regarding No. 14 and No. 3 are final, and the Cook Companies did not appeal them. Those are the trade secrets at issue, and they cannot be changed by a new videotape spliced by the Cook Companies months *after* the hearing before Judge Stocks on their contempt accusations. For all these reasons, the videotape should not be considered by the Court.

whether there has been an abuse of discretion. *Dunn v. New York State Dept. of Labor*, 47 F.3d 485, 490 (2d Cir. 1995) (denial of contempt motion affirmed); *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 145 (3d Cir. 1994) (denial of contempt motion affirmed); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993) (denial of contempt motion affirmed, noting that review of same is deferential); *Langston v. Johnston*, 928 F.2d 1206, 1220 (1st Cir. 1991) (denial of contempt motion affirmed; review through a "deferential prism"); *Davis v. Bowen*, 894 F.2d 271, 272 (8th Cir. 1989), *cert. denied*, 495 U.S. 904, 110 S. Ct. 1922, 109 L. Ed. 2d 286 (1990) (denial of contempt motion affirmed; "our review of the denial of a contempt motion is limited to determining whether the District Court abused its discretion"); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 465 (9th Cir. 1989) (same); *Neely v. City of Grenada*, 799 F.2d 203, 207 (5th Cir. 1986) (same).

This deferential standard of review is particularly appropriate in contempt matters, which involve factual findings by the trial court as to what behavior is prohibited by the Order in question and whether the complaining party has proved violation of that Order by clear and convincing evidence. *See, e.g., In re: General Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) ("The burden is on the complainant to prove civil contempt by clear and convincing evidence.") As the judge who tried this case for two and one half months in the fall of 1994, who decided all the post-trial motions, and who ruled on numerous other pre- and post-trial matters, Judge Stocks was uniquely qualified to determine the contempt matters raised by the Cook Companies. His determination of that matter — done in his typical thorough, meticulous, fair and well-reasoned fashion — was entirely correct, and correctly affirmed by both the District Court and the Fourth Circuit.

II. The evidence at the contempt hearing clearly demonstrated that Wilson and Wiltek were not in contempt.

With respect to Trade Secret No. 3, the trade secret claimed by the Cook Companies, and the trade secret that was claimed by the Cook Companies and upheld by the courts below was the particular use of a welding machine to form balls on the ends of wires. The evidence offered at the contempt hearing failed to show *any* such use of welding by Respondents. Accordingly, there was no evidence that Respondents were engaging in a prohibited behavior, and thus the courts below correctly found no contempt. The evidence at the contempt hearing before the Bankruptcy Court showed that Wiltek was using its welder to perform a *different* function, referred to as "end radiusing," and that Wiltek was doing end radiusing as early as 1993, two years *before* trial. The evidence further showed that the Cook Companies had observed Wiltek doing end radiusing well *before* trial, and yet had *never* been claimed as a trade secret or any other type of violation by the Cook Companies until two years *after* the trial, an undisputed fact which called into question the bona fides of Cook's contempt claim.

With respect to Trade Secret No. 14, the secret that was claimed by the Cook Companies, and upheld by the courts below, was the use of a particular type of liquid in the heating process required for forming catheters. The evidence at the contempt hearing showed that Wilson and Wiltek were *not using* the trade secret liquid in the catheter forming process, and accordingly there was no evidence that Wilson or Wiltek were engaging in a prohibited behavior and thus no evidence of contempt. Respondents were using a *different* liquid, a fact which the Cook Companies *again* had known as early

as 1993, two years *before* trial, but had never claimed as a trade secret or any other type of violation until two years after trial, further calling into question the bona fides of Cook's contempt claims.

III. The Fourth Circuit did not refuse to consider the doctrine of equivalents, and there is no split among the Circuits.

The Cook Companies incorrectly argue in their Petition that there was a "complete refusal" by the Fourth Circuit to consider the patent law doctrine of equivalents, and that in not applying the doctrine of equivalents to this case, the Fourth Circuit Opinion conflicts with the following decisions: *Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149 (7th Cir. 1984); *Interdynamics, Inc. v. Firma Wolf*, 698 F.2d 157 (3rd Cir. 1983); *Sure Plus Manufacturing Company v. Kobrin*, 719 F.2d 1114 (11th Cir. 1983); *McCullough Tool Company v. Well Surveys, Inc.*, 395 F.2d 230 (10th Cir. 1968), *cert. denied*, 393 U.S. 925, 89 S. Ct. 257, 21 L. Ed. 2d 261 (1968); and *KSM Fastening Systems, Inc. v. H.A. Jones Company*, 776 F.2d 1522 (Fed. Cir. 1985). Pet. at 16-17.

First, there plainly was no "complete refusal" by the Fourth Circuit to consider the patent law doctrine of equivalents, as Cook mistakenly alleges. The Fourth Circuit expressly considered the doctrine and, for reasons explained in the Opinion, rejected it. *See* Pet. App. A, p. 4a at *.

Second, there is no "split" among the Circuits on this question. All of the decisions cited by Cook in its "split" argument, with the exception of *Motorola*, are *patent* cases which discuss the patent law doctrine of equivalents in a patent contempt context. This, by contrast, is a trade secret

case. There are obvious and significant differences between trade secret law and patent law which limit the application of the doctrine of equivalents in a trade secret case, and in fact Cook cites *no* trade secret cases (with the exception of *Motorola*, discussed below) in which the doctrine of equivalents was applied. Moreover, the patent law doctrine of equivalents would be unworkable and even nonsensical in the trade secrets context.

As Judge Stocks correctly observed, the patent laws establish a monopoly for the purpose of encouraging invention in the arts. Trade secret law, by contrast, offers a form of protection against inequitable use by others where there was impropriety in obtaining knowledge of the allegedly secret processes. A patent is totally exclusionary during the period for which it is granted. A trade secret, by contrast, is protected only for so long as it remains a secret. A patent is protected after being spread on the public records for all to see. Publicity is of course anathema to trade secret protection, and a trade secret is protected only by being kept secret. *Cataphote Corporation v. Hudson*, 422 F.2d 1290, 1293 (5th Cir. 1970); *Water Services, Inc. v. Tesco Chemicals, Inc.*, 410 F.3d 163, 171 (5th Cir. 1969).

Put simply, trade secret law does not give the same protection as patent law, where liability is based primarily on similarity rather than impropriety. With patent law, independent development of a process that accomplishes the same purpose in the same way makes no difference — the developer is still liable for patent infringement. In trade secret law, by contrast, independent development of a means of performing substantially the same function in substantially the same way to obtain the same result is a defense. *See, e.g., Bolt Associates, Inc. v. Alpine Geophysical*

Associates, Inc., 365 F.2d 742, 749 (3rd Cir. 1966). In this case, for example, Judge Stocks found that the use of a different liquid in Trade Secret No. 14 was *independently developed* by the Respondents, and therefore was not substantially derived from the plaintiffs' trade secret. Accordingly, there was no violation of the Injunction.

It is well-settled that a patent owner who proves infringement is entitled to the relief afforded by 35 U.S.C. § 283, which authorizes the courts to grant an injunction to protect the rights of the patentee. A violation of an injunction may be punished by contempt. *See, e.g., Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1022 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059, 106 S. Ct. 802, 88 L. Ed. 2d 778 (1986); *Smith Int'l, Inc. v. Hughes Tool Co.*, 759 F.2d 1572 (Fed. Cir. 1985), *cert. denied*, 456 U.S. 976, 106 S. Ct. 87, 72 L. Ed. 2d 851 (1985). Contempt authority is provided to the federal courts under 18 U.S.C. § 401, which enables courts to punish by fine or imprisonment those who disobey or resist its commands.

However, the contempt inquiry in a *patent* case under *KSM Fastening Systems, Inc. v. H.A. Jones Company*, 776 F.2d 1522 (Fed. Cir. 1985), a decision cited by Cook in its "split" argument, is quite different than the typical contempt inquiry. Civil contempt "is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of defendant's conduct." *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885). Given the severity of the remedy and the summary nature of the proceedings, courts have shown restraint in affording a patent owner the benefit of contempt proceedings where "the patent owner seeks to enforce an injunction against an enjoined infringer by reason of a manufacture which was not the

subject of the original litigation." *KSM*, 776 F.2d at 1525. "[C]ontempt is a shield protecting the patentee against an infringer's flagrant disregard for court orders . . . not a sword for wounding a former infringer who has made a good-faith effort to modify a previously adjudged or admitted infringing device to remain in the marketplace." *Arbek Mfg., Inc. v. Moazzam*, 55 F.3d 1567, 1570 (Fed. Cir. 1995). "An enjoined party is entitled to design around the claims of a patent owner without the threat of contempt proceedings with respect to every modified device although he bears the risk that the enjoining court may find changes to be too insubstantial to avoid contempt." *KSM*, 776 F.2d at 1526.

In a civil contempt proceeding, a patent owner must demonstrate by clear and convincing evidence a violation of the order in question. *See Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1548 (Fed. Cir. 1987). This requires a showing that the redesign is itself an infringement. *Id.* Therefore, although "the issue in contempt proceedings is violation *vel non* of the injunction, . . . [i]nfringement is the *sine qua non* of violation of an injunction against infringement." *KSM*, 776 F.2d at 1528.

To prove infringement, a patent owner must demonstrate by a preponderance of the evidence that "the modified device falls within the admitted or adjudicated scope of the claims" *Id.* at 1530; *accord Preemption Devices v. Minnesota Min. & Mfg. Co.*, 803 F.2d 1170, 1175 (Fed. Cir. 1986). Infringement may not be proved by comparison with the device admitted to infringe. *See KSM*, 776 F.2d at 1528 ("[N]o correlation between infringement by the accused device and by the adjudged device necessarily exists as a result of their equivalence to each other.").

A patent owner may prove infringement under either of two theories: literal infringement or the doctrine of equivalents. "To establish literal infringement, a plaintiff must demonstrate that every limitation in the claim is literally met by the accused device." *Kahn v. General Motors Corp.*, 135 F.3d 1472, 1476 (Fed. Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 177, 142 L. Ed. 2d 144 (1998). If an accused device does not literally infringe a patent claim, infringement may still be established under the doctrine of equivalents. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21, 117 S. Ct. 1040, 137 L. Ed. 2d 146 (1997). Under this doctrine, patent infringement may be established if "there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." *Id.* at 1045; *accord Kahn*, 135 F.3d at 1478.

Accordingly, under the patent law doctrine of equivalents, courts must return to the patent claims themselves and consider questions of claim interpretation, prior art, and prosecution history estoppel. For all practical purposes, there is a re-litigation of the issues resolved in the initial injunction proceeding against the infringer, in a two-step process: (1) the patent claim must first be correctly construed to determine the scope of the claims; then (2) the claims must be compared to the accused device. *Kahn*, 135 F.3d at 1476.

Obviously, such a procedure would be unworkable and nonsensical in the trade secrets contempt context for numerous reasons, including those set forth above. Trade secret claims are not drafted in any manner even remotely similar to patent claims, and substantial similarity between devices or processes may be irrelevant if — as here — an allegedly offending device or process was developed

independently. Moreover, where the independently developed device or process, even if identical to the alleged secret device, is not maintained in secrecy, then the allegedly secret device or process is not a trade secret. Put simply, patent law and trade secret law are two different creatures, and no courts have applied the patent doctrine of equivalents in the trade secrets contempt context, save *Motorola*, discussed below.

The above matters, while interesting and contained with the decisions cited by Cook, are not at issue here. Rather, the sole question is whether there is a split among the circuits on the question of *trade secret* contempt, and very plainly there is not. Cook cites only *one* decision arising from a trade secret contempt proceeding, *Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149 (7th Cir. 1984). However, the issue in that case was whether a *consent decree* — not an injunction — was violated. 739 F.2d at 1156. A consent decree is much like a contract between the parties which receives the stamp of judicial approval, rather than an order drafted by the Court itself. As *Black's* states, a consent decree "is not properly a judicial sentence, but is in the nature of a solemn contract or agreement between the parties, made under the sanction of the court. . . ." *Black's Law Dictionary*, p. 370 (1979). Indeed, the Seventh Circuit in *Motorola* framed the issue as follows: "The consent decree states that CDI may no longer sell its model MPG series monitor. The first question before the district court, then, was *what the parties intended to cover by this clause.*" 739 F.2d at 1156.

Obviously, parties often disagree about the meaning of a contract, and sometimes resort to a court to interpret the agreement, as in *Motorola*. Here, by contrast, we have a 197-

page Memorandum Opinion authored by Judge Stocks. Judge Stocks plainly is the person most qualified to state what behavior his Opinion and Injunction prohibits, and he has done so in his Second Memorandum Opinion and Amendment to Second Memorandum Opinion. His views on that topic are conclusive and dispositive. There is no issue here about what the *parties* intended, since there is no consent judgment.

Furthermore, in *Motorola*, the district court interpreted the consent judgment clause to mean that CDI could not sell the MPG monitor or any monitor that was the "same" as the MPG. The district court did not explicitly define what degree of sameness was barred by the consent order, and it was on this point that the "substantially derived from" cases and the Restatement sections cited by Cook on pages 12-13 of the Petition came into play in the appellate decision. Of course, no "degree of sameness" question is present here, and the substantial derivation cases cited by Cook arose in the context of whether an item was or was not a misappropriation of a trade secret in the first instance. That context is long past in this case, having been decided in 1995. The issue that was before the courts below in this case was whether an injunction had been violated, an obviously and completely different matter.

Finally, Cook's rather sarcastic reference to the "Fourth Circuit's attempt to 'distinguish' *Motorola*," Pet. at 14 n.15, is thoroughly unpersuasive. The Fact that a consent decree constitutes a judgment is undisputed and irrelevant. The point is that it is written by the litigants, not the Judge, and thus like any other contract-type document the litigants sometimes disagree about its meaning.

It bears repeating that the undisputed evidence at the November 12, 1997, contempt hearing showed that the items alleged to be contemptuous were being used and tested by Wiltek *no later than 1993*, well *before* the trial, the Cook Companies were *well aware* of these facts, and yet they made no claim of trade secret misappropriation, or threatened trade secret misappropriation, with respect to these items until the Fall of 1997, long *after* the trial and after learning of a third party's possible interest in purchasing Wiltek. In addition to shedding light on the motivation behind the contempt proceeding, these undisputed facts demonstrate that *Wiltek* developed these processes, long *after* Jon Wilson left Wilson-Cook in 1988 and *before* the case was tried.

In sum, taken at face value, Cook's position on this appeal would virtually prohibit Wiltek from using its welder altogether and would further prohibit Wiltek from using any heated liquid, other than perhaps water, as a medium in which to form catheters. This simply is not the law, nor is it what was prohibited by Judge Stocks in the Injunction. As well-stated by the U.S. District Court for the District of Columbia, "A penalty may not be imposed for disobeying a command that exists only in one's wishful thinking." *Joshi v. Professional Health Services, Inc.*, 606 F. Supp. 302, 306 (D.D.C. 1985).

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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